

*Not To Be Published:*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
WESTERN DIVISION**

BRYAN EDWARD JASA,

Petitioner,

vs.

JOHN MATHES, Warden,

Respondent.

No. C03-4095-MWB

**MEMORANDUM OPINION AND  
ORDER REGARDING  
MAGISTRATE’S REPORT AND  
RECOMMENDATION ON  
RESPONDENT’S MOTION TO  
DISMISS**

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## ***I. INTRODUCTION AND BACKGROUND***

In his Report and Recommendation, Judge Zoss characterized the factual background as follows:

On October 1, 1996, Jasa was charged by trial information in Woodbury County with the following violations of Iowa law: attempted murder, first-degree robbery, assault while participating in a felony, willful injury, going armed with intent, and displaying a dangerous weapon in connection with the foregoing offenses. On or about October 25, 1996, Jasa's attorney filed a motion asking the court to determine whether or not Jasa was competent to stand trial. A hearing was scheduled. The State resisted the motion, and moved to depose Rodney Dean, M.D., a psychiatrist who had been treating Jasa. In addition, the State moved for permission to retain Michael Taylor, M.D., a forensic psychiatrist, as a consultant and expert witness for the State. Jasa resisted both of the State's motions. The State's motion to retain Dr. Taylor apparently was granted, and Dr. Taylor examined Jasa on October 21, 1996. The State advised the court Dr. Taylor would not be called as a witness at trial, but would be called as a witness at the competency hearing. The court entered an order allowing the State to question Dr. Taylor only about "his testing, observations, findings and conclusions arising out of his visit with [Jasa]," but not about any other matters outside the scope of Dr. Taylor's examination of Jasa on October 21, 1996. The court also granted the State's motion to depose Dr. Dean.

On November 7, 1996, Jasa moved for an order directing the Woodbury County Sheriff to allow Dr. Dean to visit Jasa "at any time on any day and that such visit be conducted confidentially." Jasa asserted he was in need of "continuing psychiatric consultation and treatment," including monitoring of his medications. The same day, a judge of the Iowa District Court for Woodbury County granted the motion, directing the Woodbury County Sheriff to allow "confidential

consultation between [Jasa] and Dr. Rodney Dean at all times and on all days as permitted by the operational Rules and procedures of the Woodbury County Jail.”

On November 27, 1996, Jasa filed a “Withdrawal of Motion for Determination of Competency and Motion for Trial Setting.” In the motion, Jasa’s trial counsel made the following representation:

The undersigned counsel assures the Court and the prosecutor that after consultation with two mental health experts known to this Court, no defense of insanity or diminished responsibility will be filed or relied upon by this Defendant. As such, the State is unable to claim reasonably that additional time is required to prepare for such defense. The Defendant will not object to a motion for continuance in the event the Defendant does file a notice of intent to rely on insanity and /or diminished responsibility as a defense herein.

The State objected, and filed its own motion asking the court to make an on-the-record determination of Jasa’s competency. The State noted that in his original competency motion, Jasa’s attorney had stated “in his professional judgment . . . the Defendant is not able to assist effectively in his defense and may otherwise not be competent.” The State noted further that in a letter dated December 3, 1996, from Jasa’s attorney to the prosecutor, Jasa’s attorney stated, “I continue to feel that [Jasa] is not competent.” The State pointed out that in his motion to withdraw the request for competency hearing, Jasa nowhere alleged he was competent, nor did he disavow his counsel’s statements that he was not competent. The State therefore asked the court to make a formal determination regarding Jasa’s competency.

Jasa resisted the State’s motion, arguing, *inter alia*, that such a ruling would constitute an advisory ruling because “there is no justiciable interest in an issue which has been

withdrawn by the movant.” Jasa also argued the State could not ask the court to act *sua sponte*, but rather was required to provide “some legal support to bear its burden.” Jasa also moved to quash a subpoena issued by the State to Dr. Dean, requesting that the doctor be present at the December 11, 1996, competency hearing.

The trial court held as follows: “The Defendant has withdrawn his (11-27-96) request for a competency hearing after the Defendant has seen two psychiatrists (Dr. Dean & Taylor). No evidence presently exists for the Court to proceed under [Iowa Code] § 812.3 *et seq.* Hence the State’s request is denied and the Defendant’s motion to quash is sustained. The trial of this matter is now set for Jan. 7, 1997 at 9:30 AM.”

Jasa proceeded to trial and was convicted by a jury of attempted murder, first-degree robbery, assault while participating in a felony, willful injury, and going armed with intent. He received various sentences totaling fifty-five years. Jasa filed a direct appeal in which he asserted only one issue, to-wit: whether the trial court erred in denying his motion for new trial based on alleged juror misconduct. The Iowa Court of Appeals affirmed Jasa’s conviction. His request for further review was denied.

Jasa filed an application for post-conviction relief (“PCR”), in which he raised several issues. On October 8, 2002, the PCR court granted the State’s motion for summary judgment and dismissed the PCR application. While the PCR application was pending, Jasa filed a *pro se* “Motion for Correction of Illegal Sentencing,” using the same case caption and case number as the PCR action. Jasa’s attorney later informed him that the PCR court had overruled the motion orally. (*See* Doc. No. 18, Ex. B) In any event, the State asserts the PCR court’s order dismissing the PCR action implicitly denied the motion, and Jasa does not contest this conclusion. (*See* Doc. No. 11, n.1; Doc. No. 17)

Jasa did not appeal the dismissal of his PCR application. By letter dated October 15, 2002, Jasa’s attorney sent him a

copy of the PCR court's October 8, 2002, order dismissing the PCR action. (*See* Doc. No. 18, Ex. A) In the letter, counsel advised Jasa, "Please contact me after you have read the decision." (*Id.*) Jasa reviewed the decision and wrote his attorney a letter dated November 11, 2002, postmarked November 12, 2002, in which he apparently asked his attorney to appeal the dismissal of the PCR application. (*Id.*, Ex. B) Jasa's attorney responded, in part, as follows:

Unfortunately, it would be too late to appeal the postconviction decision since that was issued on October 8, 2002, (thirty day limit for appeals) but I do not think that you would have had any success based upon Iowa law even if the decision had been appealed. I would recommend that you consider a 28 U.S.C. § 2254 action (habeas corpus). The time limit for that action is one year, and some courts consider that year to be running when no pending legal action is occurring, so it is very important that you get started on it as soon as you can. . . . The Court did receive your motion for Correction of Illegal Sentence and orally overruled it. Your motion brought up some issues you may want to address in habeas corpus.

(*Id.*)

Report and Recommendation on Motion to Dismiss, Doc. No. 20, at pp. 1-5 ("Report and Recommendation").

On October 6, 2003, Jasa filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. No. 3). On December 24, 2003, the respondent John Mathes ("Mathes") filed an Answer (Doc. No. 10), and a Motion to Dismiss with a supporting brief. (Doc. No 11). Mathes claimed that Jasa's habeas petition should be dismissed because Jasa had failed to preserve any federal constitutional claims on direct appeal or in

postconviction relief proceedings. (Doc. No. 11). Jasa filed a resistance to the motion to dismiss, and accompanying brief, on March 12, 2004. (Doc. No. 17). Jasa filed an appendix in support of his resistance on March 16, 2004. (Doc. No. 18). In his resistance, Jasa admitted that his claims were procedurally defaulted, but claimed that his continuing mental illness excused his default on his claims of juror misconduct and ineffective assistance of counsel. (Doc. No. 17). Mathes did not file a reply. The motion was referred to United States Magistrate Judge Paul A. Zoss pursuant to 28 U.S.C. § 636(b)(1)(B). On June 28, 2004, Judge Zoss filed his Report and Recommendation which recommended that Mathes's motion to dismiss be granted as to all of Jasa's claims. (Doc. No. 20). On July 7, 2004, Jasa filed his objections to the Report and Recommendation. (Doc. No. 21). Jasa did not object to Judge Zoss's recommended dismissal of his juror misconduct claim, but continued to object to the disposition of the ineffective assistance of counsel claim. The single question remaining for review by this court is whether Jasa's procedural default of his ineffective assistance of counsel claim is excused by his proclaimed mental illness.

## ***II. LEGAL ANALYSIS***

### ***A. Standard Of Review Of Magistrate's Report And Recommendation***

Pursuant to statute, this court's standard of review for a magistrate judge's report and recommendation is as follows:

A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). Similarly, Federal Rule of Civil Procedure 72(b) provides for

review of a magistrate judge's report and recommendation on dispositive motions and prisoner petitions, where objections are made, as follows:

The district judge to whom the case is assigned shall make a *de novo* determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b).

The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g., Hosna v. Goose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860, 117 S. Ct. 164, 136 L. Ed. 2d 107 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*), *cert. denied*, 518 U.S. 1025, 116 S. Ct. 2564, 135 L. Ed. 2d 1081 (1996). Because objections have been filed in this case to Judge Zoss's legal conclusions, the court must conduct a *de novo* review.

However, Jasa's objections are directed only at Judge Zoss's recommendations as to the procedural default of his ineffective assistance of counsel claim. Jasa expressly states that he does not object to Judge Zoss's analysis of the juror misconduct claim, nor Judge Zoss's recommendation that his juror misconduct claim be dismissed. The plain language of the statute governing review provides only for *de novo* review of "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Therefore, portions of the proposed findings

or recommendations to which no objections are filed are reviewed only for “plain error.” *See Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir. 1994) (reviewing factual findings for “plain error” where no objections to the magistrate judge’s report were filed). Upon reviewing Judge Zoss’s Report and Recommendation on Jasa’s juror misconduct claim, the court finds no “plain error” and **accepts** this portion of Judge Zoss’s Report and Recommendation.

### ***B. Procedural Default***

As Jasa does not object to the recommended dismissal of his juror misconduct claim on grounds of procedural default, only the following issue remains—does Jasa’s mental illness excuse his procedural default of his ineffective assistance of counsel claim?

#### ***1. Judge Zoss’s analysis***

Judge Zoss identified two arguments asserted by Jasa as excusing his failure to appeal the PCR ruling: (1) that Jasa’s attorney failed to advise him of the thirty-day deadline to appeal the PCR ruling; and (2) that Jasa’s mental illness impeded his ability to comprehend, and comply with, the procedural requirements. Noting that a defendant has no right to counsel in a PCR action, Judge Zoss summarily rejected any argument that ineffective assistance of counsel at the PCR level could not stand as an independent claim nor amount to ‘cause’ for Jasa’s procedural default. Therefore, Judge Zoss found that Jasa’s reliance on misinformation from his PCR attorney in considering an appeal of the denial of his PCR application could not serve as cause for Jasa’s failure to timely appeal from the PCR ruling. Report and Recommendation at pp. 7-8. Judge Zoss also rejected Jasa’s contention that his mental illness prevented him from filing a timely appeal from the denial of his PCR application. From the sequence of events, Judge Zoss concluded that it was clear that “Jasa’s failure to appeal was due to his PCR attorney’s failure to advise



him of the time in which an appeal had to be filed, *not* due to Jasa's inability to understand his attorney's instructions, or Jasa's failure to comprehend his legal rights." *Id.* at p. 9. Ultimately holding that Jasa's proclaimed mental illness could not serve as cause for his procedural default, Judge Zoss recommended that the motion to dismiss be granted, and that Jasa's writ be denied.

## **2. *Jasa's objections***

Though conceding that Judge Zoss cited the correct legal standard for assessing whether a mental defect provided cause to excuse procedural default, Jasa contends that Judge Zoss incorrectly applied that standard to the facts. Specifically, Jasa reiterates that his competency to stand trial was hotly contested, and that his primary theory for recovery in his PCR application was his trial attorney's failure to use Jasa's mental illness to mount a diminished capacity defense on all counts, and not just robbery. Jasa indicates that the lucidity of his affidavit should not be held against him in determining his mental state because a fellow inmate helped him to prepare it. Jasa also asserts that the prior proceedings corroborate his claimed mental illness, and call into question his ability to understand his legal rights. Ultimately, Jasa claims that Judge Zoss erred in refusing to find that Jasa's mental illness amounted to cause for excusing Jasa's procedural default on the ineffective assistance of counsel claim.

## **3. *The law***

Though Jasa has procedurally defaulted on his ineffective assistance of counsel claim, he is nonetheless entitled to federal habeas review of this defaulted claim if he can show "(1) cause for the default and (2) prejudice as a result of the alleged violation of federal law." *Oxford v. Delo*, 59 F.3d 741, 747 (8th Cir. 1995) (citing *Coleman v. Thompson*, 501 U.S. 722, 749-50, 111 S. Ct. 2546, 2564-65, 115 L. Ed. 2d 640 (1991)), *cert. denied*, 517 U.S. 1124, 116 S. Ct. 1361, 134 L. Ed. 2d 528 (1996). The Eighth

Circuit Court of Appeals has stated the following regarding mental illness as an excuse for procedural default:

“[T]he existence of cause for procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel’s efforts to comply with the State’s procedural rule.” *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639 (1986); *see also Cawley v. DeTella*, 71 F.3d 691, 696 (7th Cir. 1995) (depression not an external impediment). For mental illness to excuse the procedural bar arising from the failure to pursue state postconviction remedies, the petitioner must make *a conclusive showing* that he or she was incompetent at the time of the postconviction proceedings. *See Nachtigall v. Class*, 48 F.3d 1076, 1081 (8th Cir. 1995). To be deemed incompetent, the petitioner must have been “‘suffering from a mental disease, disorder, or defect that may substantially affect his capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation.’” *Id.* (quoting *Anderson v. White*, 32 F.3d 320, 321 (8th Cir. 1994)).

*Ervin v. Delo*, 194 F.3d 908, 915 (8th Cir. 1999) (emphasis added); *see also Holt v. Bowersox*, 191 F.3d 970, 974 (8th Cir. 1999) (noting that for mental illness to excuse procedural default, “a conclusive showing that mental illness interfered with a petitioner’s ability to appreciate his or her position and make rational decisions regarding his or her case at the time during which he or she should have pursued post-conviction relief” must be made). The inquiry is limited to “the time period during which he should have pursued post-conviction relief.” *Holt*, 191 F.3d at 974-75.

#### **4. Resolution**

For Jasa’s purported mental illness to amount to ‘cause’ to excuse his procedural default he must make a *conclusive showing* that he was incompetent at the time he should

have appealed from the denial of post-conviction relief. *See Holt*, 191 F.3d at 974-75; *Nachtigill*, 48 F.2d at 1081. The record shows that Jasa was evaluated by at least two different doctors to assess his mental state prior to his trial, and as a result of these evaluations<sup>1</sup> Jasa's motion for a competency hearing was withdrawn. Following these evaluations, Jasa's trial counsel firmly asserted that Jasa would not raise a defense of insanity or diminished responsibility. Further, when the State subsequently moved for the court to hold a competency hearing, Jasa vehemently resisted the motion and the court ultimately denied the State's request. Nonetheless, in his affidavit in support of his resistance to Respondent's motion to dismiss, Jasa asserts the following with regard to his mental condition:

3. I have mental illnesses which have been diagnosed as severe obsessive compulsive disorder and bi-polar disorder.

4. Each day I take medication prescribed by Iowa Corrections medical and psychiatric physicians, consisting of 600 mg Lithium and 40 mg Prozac which I take daily.

5. Despite taking the medications prescribed to control my mental illnesses I continue to experience some effects of my mental illnesses.

6. I have had these mental illnesses for many years, since before the date of my assault upon an innocent victim which led to my criminal conviction.

7. Being incarcerated after my criminal convictions and sentencing exacerbated my mental illnesses.

8. My mental illnesses cause me mental incapacity which has prevented me from understanding my legal rights, obtaining assistance from other prisoners which might have helped me to assert my legal rights, communicating adequately with my appointed counsel in state-court proceedings after my

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<sup>1</sup>While it is clear from the record that these evaluations were performed on Jasa, no evaluations from any medical health professional are a part of the record.

sentencing, comprehending the meaning and legal import of communications I received from my appointed counsel in state-court proceedings, and acting appropriately to assert my legal rights in state-court proceedings subsequent to my being sentenced.

9. My mental incapacity is the cause of my failure to assert my rights on direct appeal to raise the issue of the insufficiency at trial of the evidence to support a conviction of first-degree robbery and to preserve for further consideration in post-conviction relief all matters related to my claim of a lack of sufficient evidence to support the first-degree robbery conviction.

10. My mental incapacity is also the cause of my failure to adequately assess my legal rights on that same evidentiary claim in state post-conviction relief proceedings, and to direct my court-appointed attorney in that proceeding to adequately raise that issue.

11. My mental incapacity is also the cause of my failure to appeal the summary dismissal of my pro se application for state post-conviction relief and to assert my additional claim at that stage that my appointed legal counsel had failed to provide me competent assistance of counsel.

Affidavit of Bryan Edward Jasa, Doc. No. 18, Habeas Exh. C. at p. 1-2. Jasa has not submitted any medical records, reports, or evaluations in support of these assertions. Other than Jasa's averments as to his mental illnesses, and the procedural history of the case—including Jasa's original motion for a competency hearing, withdrawal of that motion, and later resistance to the State's motion for such a hearing—there is nothing else in the record from which the court could determine whether Jasa's mental illnesses "substantially affect[ed] his capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation." *Ervin*, 194 F.3d at 915. It may well be true that Jasa suffers from any number and combination of mental disorders, but it is clear that a mere "showing that [Jasa] suffers from a mental disorder, 'without

more, is wholly insufficient to meet the legal standard the Supreme Court has laid down' for determining a defendant's competence to pursue post-conviction relief." *Anderson v. White*, 32 F.3d 320, 322 (8th Cir. 1994) (quoting *Smith v. Armontrout*, 865 F.2d 1502, 1506 (8th Cir. 1988) (en banc)).

Further, to meet the threshold for establishing cause due to mental illness, Jasa must show that his mental disorders made him unable to comprehend his legal rights and responsibilities "at the time . . . during which he should have pursued post-conviction relief." *Holt*, 191 F.3d at 974-75; *see also Stanley v. Lockhart*, 941 F.2d 707, 709 (8th Cir. 1991) (finding that evidence was too inconclusive to support a finding that the petitioner "was incompetent at the time he failed to timely appeal from the denial of his state court petition for post-conviction relief . . . ."). The time period the standard references is important, because over five-years had elapsed between Jasa's evaluations by mental health officials in conjunction with his trial in 1997, and his failure to appeal the denial of his post-conviction relief application in 2002. There is nothing in the record from which the court could conclude that Jasa's mental state, which was evaluated by mental health professionals in 1997, had deteriorated to such an extent that Jasa was unable to understand or comply with the State's procedural requirements. Further, as Judge Zoss noted, "[a]lthough Jasa has alleged he takes medication, there is no indication in the record that, appropriately medicated, he is incompetent." Report and Recommendation at p. 10.

Finally, it seems clear from Jasa's affidavit that it was the misinformation he obtained from PCR counsel,<sup>2</sup> not his mental incapacity, that prevented him from timely

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<sup>2</sup>Though Jasa does not specifically object to Judge Zoss's finding that there is no cognizable claim for ineffective assistance of PCR counsel, in the interest of completeness the court would like to reaffirm Judge Zoss's position in this regard. The law is clear that  
(continued...)

appealing the denial of post-conviction relief. Jasa specifically details the communications he had with PCR counsel, the misinformation he received, and that his failure to comprehend the time period in which he had to appeal *was due to this misinformation, not a byproduct of his mental illnesses*. In this regard the court agrees with the following conclusion reached by Judge Zoss: “The sequence of events makes it clear that Jasa’s failure to appeal was due to his PCR attorney’s failure to advise him of the time within which an appeal had to be filed, *not* due to Jasa’s inability to understand his attorney’s instructions, or Jasa’s failure to comprehend his legal rights.” Report and Recommendation at p. 9.

After reviewing the record, the court must agree with Judge Zoss’s conclusion that Jasa’s showing fails to rise to the level of ‘cause’ to excuse procedural default of the ineffective assistance of counsel claim.

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<sup>2</sup>(...continued)

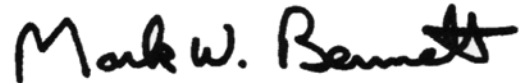
there is no right to counsel in a PCR action. *See Colman v. Thompson*, 501 U.S. 722, 752, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991) (“There is no constitutional right to an attorney in statement post-conviction proceedings.”); *Burns v. Gammon*, 173 F.3d 1089, 1092 (8th Cir. 1999) (noting that the difficulty with the petitioner’s claim for ineffective assistance of counsel was that he “had no federal right to any lawyer so far as post-conviction proceedings were concerned.”). It is equally clear that Jasa cannot claim constitutionally ineffective assistance of counsel in post-conviction proceedings. *See Colman*, 501 U.S. at 752, 111 S. Ct. 1546; *Wainwright v. Torna*, 455 U.S. 586, 587-88, 102 S. Ct. 1300, 71 L. Ed. 2d 475 (1982) (stating that where there is “no constitutional right to counsel, [the petitioner] could not be deprived of the effective assistance of counsel . . . .”); *Anderson v. Bowersox*, 262 F.3d 839, 842 (8th Cir. 2001) (“Ineffective assistance of post-conviction counsel may not be the basis of federal habeas relief.”). Therefore, “[s]ince there is no right to effective assistance of counsel in state post-conviction proceedings, ineffective assistance of counsel cannot serve as cause for [Jasa’s] default.” *Pollard v. Delo*, 28 F.3d 887, 888 (8th Cir. 1994) (citing *Colman*, 501 U.S. at 753-55, 111 S. Ct. 1546).

### ***III. CONCLUSION***

Jasa's objections to Judge Zoss's legal conclusions are **overruled**. The court **accepts** Judge Zoss's Report and Recommendation in its entirety. Accordingly, Mathes's motion to dismiss is **granted**.

**IT IS SO ORDERED.**

**DATED this 13th day of September, 2004.**

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is written in a cursive style with a prominent "M" and a stylized "B".

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MARK W. BENNETT  
CHIEF JUDGE, U. S. DISTRICT COURT  
NORTHERN DISTRICT OF IOWA